



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 141 OF 2010
BETWEEN

EVERLYN JEBITOK KETER:.....APPLICANT

AND

HENRY KIPLAGAT MUGE:.....1ST RESPONDENT

SIMON KIPTARUS KIRUI:.....2ND RESPONDENT

WILLIAM KIPSANG KIRUI:.....3RD RESPONDENT

(Being an appeal from the decision of the Principal Magistrate Hon. J.M. Njoroge dated 31st September, 2010 in Kapsabet Principal Magistrate's Court Civil Case No. 30 of 2006)

RULING

The applicant, **Everlyne Jebitok Keter**, seeks by her Notice of Motion dated 31st January, 2011, a stay of execution of the decree issued by the Principal Magistrate in Kapsabet Principal Magistrate's Court Civil Case Number 30 of 2006. She specifically seeks that the status quo over Nandi/Chemase/270 existing prior to the issue of the said decree be maintained pending the hearing and find determination of her appeal.

The application is expressed to be brought under Order 42 Rule 6 of the Civil Procedure Rules. It is predicated on the main ground that substantial loss will result to the applicant unless the order of stay is made. The application is also supported by an affidavit sworn by the applicant. She depones that unless stay is granted, the respondents shall execute the decree and the applicant will suffer irreparable loss and damage because the issue raised in the appeal involves land which is quite emotive.

The application is opposed and there is a replying affidavit sworn by the 1st respondent. He depones, *inter alia*, that the applicant has not demonstrated sufficient cause why a stay should be granted; that she is guilty of inordinate delay; that no substantial loss will result to her unless the order is made and that she has failed to furnish security for the due performance of the decree.

When the application came up before for hearing on 29th March, 2011, counsel agreed to file written submissions which were in place by 24th May, 2011. The submissions reiterated the parties' stand-points taken in their respective affidavits.

I have considered the application, the affidavits filed by both parties and the submissions of counsel. Having done so, I take the following view of the matter. What is to be considered in an application such as the present one is found in order 42 Rule 6 of the Civil Procedure Rules. Under the rule, I am required to consider whether or not there is sufficient cause to warrant the stay of execution as mere filing of an appeal cannot operate as a stay of execution. The applicant must also show that she

will suffer substantial loss unless stay is ordered and that the application has been lodged without unreasonable delay. She also had to furnish security for the due performance of the decree.

With regard to delay the applicant's application for stay in the Lower Court was dismissed on 30th September, 2010. This application was then lodged on 1st February, 2011. The delay involved is therefore of about four (4) months. The delay is not explained. In the absence of any explanation, I consider the delay inordinate. The applicant has contended, in her affidavit, that unless stay is granted the respondents shall execute the decree which event will occasion her irreparable loss and damage. The loss to be suffered is not demonstrated. Given that the appellant's case was dismissed, I am unable to appreciate how such an order can be stayed. I also do not think that the appellant's appeal can be rendered nugatory unless a stay is ordered. The respondents can only execute to recover their costs. The applicant has not demonstrated that they have no means to refund the same if her appeal succeeds and the costs have been recovered. **In Kenya Shell Limited -V- Kariga [1982 - 88] I KAR 1018** the following passage is found:-

“It is usually a good rule to see if O.41 r.4 (present Order 42 Rule 6) of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay.

That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

In this case the applicant has not shown how she stands to suffer unless stay is ordered. She has therefore not demonstrated that substantial loss may result to her unless the order of stay is made.

With regard to security none has been offered by the applicant.

In all the above circumstances the applicant has not demonstrated sufficient cause nor has she satisfied any of the requirements for stay of execution set out in Order 42 Rule 6 of the Civil Procedure Rules. The applicant's Notice of Motion dated 31st January, 2011 and filed on 1st February, 2011 is without merit. It is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET

THIS 27TH DAY OF JULY, 2011

F. AZANGALALA

JUDGE

Read in the presence of:

Mr. Nyamweya for the Respondent

F. AZANGALALA

JUDGE

27TH JULY, 2011